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In the
Supreme Court of the United States

DOUG MORGAN; ROBIN MORGAN; JIM SHELL; SUNNY SHELL; SHERRIE VERSHER; AND CHRISTINE WADE,
Petitioners,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, et al.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF CHARLES BARUCH, WALKER BATEMAN IV, AND WALLBUILDERS, INC.

in support of the *Petitioners*.

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INTEREST OF *AMICI CURIAE*[1]

Walker Bateman IV is a former school board member in the Highland Park Independent School District in Highland Park, Texas. Located in Dallas, HPISD's total student enrollment for the 2009-2010 school year is around 6,400, including a high school of approximately 1,900 students.

Charles "Chad" Baruch is an administrator at Yavneh Academy of Dallas, a private high school in Dallas. He previously served as a teacher or coach in large public high schools in South Dakota, Minnesota, and Wisconsin.

Mr. Bateman and Mr. Baruch are concerned about the constitutional and educational implications of the Fifth Circuit's decision. They worry that the public education community, hesitant to oppose one of its own members and adopting a "circle the wagons" mentality, may not completely or accurately explain those implications to this Court. Mr. Bateman and Mr. Baruch tender this Brief solely to help this Court understand the issues presented in this case, offering the perspective of high school administrators working "in the trenches"

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[1] The parties received timely notice pursuant to this Court's Rule 37 (2) a and have consented to the filing of this Brief. Copies of the letters of consent accompany this Brief. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amici Curiae* and their counsel.

of American public education.[2]

Amicus WallBuilders, Inc., also has an interest in the constitutional and educational implications of the Fifth Circuit's decision. WallBuilders' President, David Barton, is a recognized authority in American history and the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812. Lastly, due to his expansive work and knowledge in American history, Mr. Barton has received numerous national and international awards that have distinguished him as a leading scholar in his field.

SUMMARY OF THE ARGUMENT

America's principals need this Court's help. As the result of a nationwide effort by school boards and

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[2] Although Mr. Bateman and Mr. Baruch are not themselves administrators in the public schools, their combined experiences within the public and private school systems have afforded them insight into the unique problems associated with handling matters of student speech.

their association attorneys to have circuit courts discard *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the standard governing student speech rights is hopelessly muddled. And if federal judges and legal scholars cannot agree on the applicable standard, what chance do principals have?

This Court should not countenance uncertainty in this area of the law; instead, this Court should grant certiorari to provide principals with a clear statement of the standard governing student speech, permitting principals to return their focus to academic success and alleviating their present burden of having to asses competing legal standards enunciated by lower courts.

Mr. Bateman, Mr. Baruch, and WallBuilders, Inc., make three arguments in support of the Petition for Writ of Certiorari. First, the Fifth Circuit's decision deepens the already substantial confusion surrounding student speech rights. If this Court does not address that confusion, high school principals and students will continue to suffer from a lack of clear guidance and needless litigation will result. Second, *Tinker* provides a straightforward standard easily understood by high school principals (who deal every day with preventing school disruption, but likely lack experience with content-neutrality) and permits principals all the leeway necessary to maintain school order. *Tinker* is the only standard that grants principals that leeway while still respecting the constitutional rights afforded to students—and harmonizing school discipline with the important role that America's

public schools play in preparing students to function as informed citizens in our democratic system. Third, the Fifth Circuit's ruling removes any meaningful limitations on the authority of school officials to suppress student expression, and will lead to a host of overly restrictive school policies squelching students' First Amendment rights.

ARGUMENT

I. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY AND UNIFY THE FEDERAL CASE LAW CONCERNING STUDENT SPEECH RIGHTS.

For years, high school administrators and students assumed that *Tinker* governed all student speech (except speech covered by the narrow exceptions carved out in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), and *Morse v. Frederick*, 127 S. Ct. 2618 (2007)). Over the past decade, that certainty has yielded to growing confusion and—more recently—disagreement among the circuit courts. Consequently, principals across the country are left to harmonize and apply competing legal standards to student speech issues. The time has come for this Court to clarify to school administrators the standard applicable to student speech.

Even legal scholars struggle to make sense of the various standards enunciated by the circuit courts, noting the "debate" over *Tinker*'s applicability to content-neutral restrictions (*See* Petition for Writ of Cert. at 21, and citations therein). Indeed, the

district court certified its judgment in this case for the Fifth Circuit to clarify the applicable legal standard. (App. 22.)

If legal scholars and federal judges are uncertain of the proper standard, where does that leave principals? Too often, trying to sort out conflicting federal opinions, or wasting time seeking legal counsel for cases involving student expression (assuming they work in a district large enough to have legal counsel, but small enough to make counsel accessible to administrators). At best, this is an unacceptable diversion of attention away from the already difficult task of promoting academic excellence. At worst, it perpetuates needless lawsuits between American students and their schools. Preventing either of these scenarios is reason enough for this Court to grant certiorari.

II. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY THAT *TINKER* CONTROLS STUDENT SPEECH CASES BECAUSE IT PROVIDES THE CLEAREST AND MOST APPROPRIATE STANDARD FOR SCHOOL PRINCIPALS TO USE.

A. The *Tinker* standard is easily understood and applied by school principals, and permits them all the power necessary to maintain order.

Forty years ago, this Court struck exactly the right balance between the need for administrators to

maintain order in America's public schools and the need for young Americans to learn to function as citizens in a vibrant democracy by exercising their First Amendment liberties. In *Tinker*, this Court made clear to administrators and students alike that:

- political speech does not lose its constitutional protection simply because it is exercised by a student attending—often under threat of criminal sanction for non-attendance—one of America's public schools, but that

- students may not rely on the First Amendment to disrupt the educational process or infringe on the rights of their classmates.

Tinker was to student expression and political participation what *Brown v. Board of Education*, 347 U.S. 483 (1954), was to student equal-opportunity. It reaffirmed that a core value of the Constitution does not cease to exist in America's public schools.

Tinker provides a standard uniquely well-suited to principals. Most American public school principals lack experience with the intricacies of *content-neutrality* or *least-restrictive means*. But they understand disruption. They *live* disruption. The average American principal can easily forecast the likelihood of a particular act or event causing substantial and material disruption. That is a call principals are asked to make time and again in the

exercise of their duties.

Tinker affords principals ample leeway to maintain school order. *Tinker* permits school administrators to control student speech that "materially and substantially disrupt[s] the work and discipline of the school," or causes "substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513.

Although the phrase "invasion of the rights of others" has been used differently by various circuit courts, *see e.g. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), and *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993), its application here is unnecessary—the religious speech at issue did not invade the rights of other students. A student's benign expression of religious belief does not attack other students. And the suppression of religious expression—which the Founders singled out for protection—is an inappropriate means of appeasing other students (or their parents) who are offended that some students have religious faith and choose to talk about it.

With the exception of lewd, obscene, or school-sponsored speech, or speech that advocates illegal drug use, a school has no legitimate reason for censoring student speech. *Tinker* permits principals to address these situations, vesting them with unfettered power to stifle *all* student expression likely to interfere materially with the educational process. Any greater power fails to serve a legitimate educational purpose.

B. *Tinker* Permits Maintenance of Order within the School While Still Respecting the Constitutional Rights of Students.

This Court "has long recognized what none of us can doubt: education is vital to citizenship in a democratic republic." Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 131 (1995). America's public schools are charged with inculcating in students an understanding of and appreciation for the principles of the Constitution.

When a school stifles speech—especially speech not even arguably impeding the school's educational mission—it is antithetical to teaching the value of free expression. Constitutional socialization requires scrupulous protection of student free expression "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

The core role schools play in citizenship is beyond doubt. In September 2004, the National Association of Secondary School Principals, a professional organization comprised of more than 30,000 middle and high school administrators, devoted an entire issue of its national magazine, *Principal Leadership*, to the topic of "Making Civics

Real." According to one article in that issue:

> Creating informed, engaged citizens who are knowledgeable voters and active participants in both the democratic process and their communities may be *our single-most important mission as educators.*

Kathryn A. Agard, *Learning to Give*, Principal Leadership, Sept. 2004, at 43, 46 (emphasis added).

Education—or at least effective education—is not something that the school does *to* the student. Rather, education involves an interactive process revolving around a free exchange of ideas. And—contrary to Plano ISD's policy— this free exchange of ideas should not be limited to the classroom; it should take place in the cafeteria, the commons, the library, and the locker room. As this Court has cautioned, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'" *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)). Stifling student speech without cause undercuts this goal and leaves students unprepared to participate in our nation's political system.

III. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FIFTH CIRCUIT'S DECISION REMOVES ANY LIMITATION ON SCHOOL AUTHORITY TO STIFLE STUDENT EXPRESSION.

Explaining away *Tinker* as being about an effort "to silence the student because of the particular viewpoint he expressed," the Fifth Circuit adopted a standard that gives the Government a free hand to stifle virtually all student speech. Under this curious standard, the more speech the Government bans, the less scrutiny is applied to the Government's censorship.

The substantial experience of the *Amici Curiae* in public education leaves them with little doubt the Fifth Circuit's decision—if permitted to stand—will result in a host of restrictive speech policies across the American Southwest. The notion of unfettered Government power to restrict the speech of any class of citizens should send chills up the spine of anyone concerned about governmental intrusion into matters of conscience.

The Petition for Writ of Certiorari actually understates the potential danger of this intrusion by claiming school officials will likely ban only "disfavored" messages. In fact, school officials are likely to go much further, and ban all messages—favored or disfavored—with potential to engender any small degree of controversy.

This case demonstrates the potential for such oppressive censorship. Correctly forecasting the Fifth Circuit's casting aside of *Tinker*, Plano ISD has attempted to banish religious expression from its schools. And the targeted expression actually is the majority viewpoint, Christianity. Plano ISD attempted to ban the expression not because the majority disfavors it, but because it might trigger

dissent. Where the school district's concern should have been the scrupulous protection of its students rights to express their personal religious beliefs, it instead chose to suppress that expression.

Tinker expressly and appropriately rejected this type of message-control by stating that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511. As Justice Jackson so famously put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion . . . ." *Barnette*, 319 U.S. at 642.

CONCLUSION

The Fifth Circuit's decision grants authority to principals far exceeding the power necessary to maintain school order. Instead, the Fifth Circuit has provided principals with infinitely-elastic power to stifle student expression in violation of the First Amendment. Judicial deference to educators is important, but not at the expense of the Constitution. School administrators are asked to perform a daunting arrays of tasks, but "none that they may not perform within the Bill of Rights." *Barnette*, 319 U.S. at 637.

This Court should grant the Petition for Writ of Certiorari to reaffirm the balance between

maintaining school order and protecting students' constitutional rights necessary to ensure a

generation prepared to lead this nation into the middle of the twenty-first century.

Respectfully submitted,
this 19th day of April 2010,

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